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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/810,944	03/26/2004	Edward D. Glas	MS307029.01 / MSFTP637US	9894
27195 7590 04/20/2009 AMIN, TUROCY & CALVIN, LLP 127 Public Square 57th Floor, Key Tower CLEVELAND, OH 44114			EXAMINER HUYNH, PHUONG	
			ART UNIT 2857	PAPER NUMBER
			NOTIFICATION DATE 04/20/2009	DELIVERY MODE ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b> 10/810,944	<b>Applicant(s)</b> GLAS ET AL.	
	<b>Examiner</b> PHUONG HUYNH	<b>Art Unit</b> 2857	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 04 February 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

### **DETAILED ACTION**

1. In view of the Appeal Brief filed on February 04, 2009, PROSECUTION IS HEREBY REOPENED. A new ground of rejection is set forth below.

To avoid abandonment of the application, appellant must exercise one of the following two options:

(1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,

(2) initiate a new appeal by filing a notice of appeal under 37 CFR 41.31 followed by an appeal brief under 37 CFR 41.37. The previously paid notice of appeal fee and appeal brief fee can be applied to the new appeal. If, however, the appeal fees set forth in 37 CFR 41.20 have been increased since they were previously paid, then appellant must pay the difference between the increased fees and the amount previously paid.

A Supervisory Patent Examiner (SPE) has approved of reopening prosecution by signing at the end of Office Action.

### ***Claim Rejections - 35 USC § 102***

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Doane (USPAP. 2002/0138226).

Regarding claim 1, Doane discloses a computer-implemented system that test loads a server [see also Paragraph [0043] comprising:

a plurality of simulated uses utilized to test load a server [simulated users as in Paragraphs [0063] and [0042]];

a dynamic load adjustor component that dynamically adjusts at least one characteristics of at least one of the simulated users based at least in part on a browser type related to the simulated user [see Doane: Paragraph [0032] for browser types of simulated remote user], for distribution thereof as a percentage of total requests sent to the server being load tested [see Doane: Paragraph [0063]; see also Paragraphs [0064] or see simulated browser type in Paragraph [0065]; see also Paragraph [0057] for ability to customize the Recordings via a Log Editor of a system-user, i.e. to modify the previously recorded browsing activity or activities; and [Paragraph [0066] for the Test Scenario Manager Module that can modify the applied weight to select the percentage of simulated user types in any one scenario]; [see also Paragraph [0043]].

Regarding claim 2, Doane discloses a profile characteristic data store that supplies the dynamic load adjustor component with weighting for a characteristic define in a user profile [see Doane: Paragraphs [0063] and [0065]; see also Paragraph [0032]].

Regarding claim 3, Doane discloses that the dynamic load adjustor component further comprises a weighting designator that randomly assigns to users characteristics

based on weightings defined in the user profile [see Doane: Paragraph [0065] for the test scenario manager software module].

Regarding claim 4, Doane disclose that the characteristics comprises at least one of network connections, browser types, and load patterns [see Doane: Paragraphs [0032], [0063], [0065]].

Regarding claim 5, Doane discloses that the characteristic statistically determined based on web log records [see Doane: Paragraphs [0065], also [0063]].

Regarding claim 6, Doane discloses the characteristic predetermined in a single user profile [see Doane: Paragraph [0065]].

Regarding claim 7, Doane discloses a load coordinator component that adjusts an intensity of a load test based on a current distribution of simulated users entering and leaving the server relative to a desired test load [see Doane: Paragraph [0063] for example for the system user may select the distribution of simulated user tolerance levels to meet *the expected tolerance level* of real-world users; Paragraph [0064] for customizing the load test to conform to the projected statistics of the use of the site of interest and the system user can determine the maximum load level of simulated users].

Regarding claim 8, Doane discloses an artificial intelligence component [see Doane: Paragraph [0063] for example for the system user may select the distribution of

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simulated user tolerance levels to meet *the expected tolerance level* of real-world users; Paragraph [0064] for customizing the load test to conform to the projected statistics of the use of the site of interest and the system user can determine the maximum load level of simulated users; see Paragraph [0066] for the query of number of users, the ramp up period and the ramp up model rate and for error check so that the system user can modify user weight for user scenario; and Paragraph [0067] for allocation of resources and [0068] for the account-based system properly tracks and limit as well as provides billing data for the users utilization of resources].

Regarding claim 9, Doane discloses a closed loop control to enable a continual and sustained rate of requests to the server [see Doane: Paragraph [0066]; see also Paragraph [0063] for drop-rate].

Regarding claim 10, Doane discloses a machine-implemented system that stresses a server comprising:

an execution engine that generates a scenario that loads that server via a plurality of simulated users, the plurality of simulated users dynamically adjusted based on predetermine weightings of a user profile related to at least one of the simulated users having weighted characteristics that comprises at least a browser type therein, wherein the scenario distributes user characteristics as a percentage of total request [see Paragraph [0063] for the execution of the Load Test Scenario]; [Paragraph [0066] for the Test Scenario Manager Module that can modify the applied weight to select the

percentage of simulated user types in any one scenario]; see Paragraph [0032] for the weighted browser types for example; see also Paragraphs [0064], [0065] and [0043]].

Regarding claim 11, Doane discloses the scenario comprises at least one of a test mix and a load profile [see Doane: Paragraph [0064]].

Regarding claim 12, Doane discloses a control input that adjust rate of requests loaded onto the server [see Doane: Paragraph [0066]].

Regarding claim 13, Doane discloses a queuing mechanism that retrieves and sorts requests to be sent to the server [see Doane: Paragraph [0063]: the system user to select the browsing activities at arrival rates characterized by linear, exponential, or Poisson types of distributions. The system user can *weight* the types of simulated users produced by the load test software as, for example, new users, pre-registered users, and temporary visitors and the system user may select the distribution of simulated user tolerance levels to meet the expected tolerance level of real-world users. That is, the system user may select the percentage of total simulated users that are of high, medium, or low patience with site mis-performance. This allows the system user to determine what the drop-off rate of users is when a site starts to become overloaded by interactive request].

Regarding claim 14, Doane discloses a scheduler that determines number of requests to be generated for an upcoming period [see Doane: Paragraph [0067]

for scheduling and also Paragraphs [0068]].

Regarding claim 15, Doane discloses that the requests sorted according to a time function for execution [see Doane: Paragraphs [0066] and [0067]].

Regarding claim 16, Doane discloses a computer-implemented method for load testing a server comprising:

assigning weights to user characteristics in a user profile [see Doane:

Paragraphs [0065] and also [0063];

dynamically adjust the user characteristics based on one or more browser types [see Doane: Paragraph [0032] for weighted browser types of simulated remote user], for distribution thereof as a percentage of total requests sent to the server being load tested [see Doane: Paragraph [0063]; and [Paragraph [0066] for the Test Scenario Manager Module that can modify the applied weight to select the percentage of simulated user types in any one scenario]; [see also Paragraphs [0043], [0064], [0065]];

distributing the user characteristics as a percentage of total simulated user requests sent to the server [see Doane: Paragraph [0063]]

Regarding claim 17, Doane discloses comparing a current load on the server with a desired load [see Doane: Paragraph [0063] for example for the system user may select the distribution of simulated user tolerance levels to meet *the*



*expected tolerance level* of real-world users; Paragraph [0064] for customizing the load test to conform to the projected statistics of the use of the site of interest and the system user can determine the maximum load level of simulated users].

Regarding claim 18, Doane discloses creating a new user if the current load falls below a desired load [see Doane: Paragraph [0063] for example for the system user may select the distribution of simulated user tolerance levels to meet *the expected tolerance level* of real-world users; Paragraph [0064] for customizing the load test to conform to the projected statistics of the use of the site of interest and the system user can determine the maximum load level of simulated users; see Paragraph [0066] for the query of number of users, the ramp up period and the ramp up model rate and for error check so that the system user can modify user weight for user scenario].

Regarding claim 19, Doane discloses reducing the current load by one upon ending an iteration, if the current load rises above the desired load [see Doane: Paragraph [0063] for example for the system user may select the distribution of simulated user tolerance levels to meet *the expected tolerance level* of real-world users; Paragraph [0064] for customizing the load test to conform to the projected statistics of the use of the site of interest and the system user can determine the maximum load level of simulated users; see Paragraph [0066] for the query of number of users, the ramp up period and the ramp up model rate and for error

check so that the system user can modify user weight for user scenario].

Regarding claim 20, Doane discloses controlling a range of loading via a feedback loop control [see Doane: Paragraph [0066]; see also Paragraph [0063] for drop-rate].

Regarding claim 21, Doane discloses a machine-implemented system for test loading a server comprising:

means for dynamically adjusting characteristics of a simulated user while loading the server [see Doane: Paragraph [0032] for weighted browser types of simulated remote user], for distribution thereof as a percentage of total requests sent to the server being load tested [see Doane: Paragraph [0063]; and [Paragraph [0066] for the Test Scenario Manager Module that can modify the applied weight to select the percentage of simulated user types in any one scenario]; [see also Paragraphs [0043], [0064], [0065]];

means for distributing the simulated user characteristics as a percentage of total requests to the server, each user characteristic including at least a browser type [see Doane: Paragraph [0063]].

### ***Conclusion***

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3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to PHUONG HUYNH whose telephone number is (571)272-2718. The examiner can normally be reached on M-F: 8:30AM-5:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ramos-Feliciano Eliseo can be reached on 571-272-7925. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/P. H./  
Examiner, Art Unit 2857  
April 10, 2009

/Eliseo Ramos-Feliciano/  
Supervisory Patent Examiner, Art Unit 2857